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f/k/a Shuffle Master, Inc.

9 UNITED STATES DISTRICT COURT

10 DISTRICT OF NEVADA

11 LT GAME INTERNATIONAL LTD.,

Case No.: 2:12-cv-01216-GMN-GWF

12 vs.

13 SHUFFLE MASTER, INC.,

**OPPOSITION TO PLAINTIFF  
LT GAME INTERNATIONAL LTD.'S  
MOTION FOR LEAVE TO FILE  
SECOND AMENDED COMPLAINT**

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16  
17 **I. INTRODUCTION**

18 Plaintiff LT Game International Ltd.'s ("LT Game") request for leave to amend its First  
19 Amended Complaint is a too little, too late attempt to save their lawsuit. For months Defendant  
20 SHFL entertainment, Inc. f/k/a Shuffle Master, Inc. ("Shuffle Master") has told LT Game that its  
21 pleadings are insufficient and do not give Shuffle Master adequate notice of its claims. LT Game  
22 unabashedly asserted that it had no duty (nor ability) to provide Shuffle Master with more  
23 information about its claims or even the purportedly interested parties in the case.

24 LT Game's position abruptly changed on January 24, 2013, however, when Magistrate  
25 Judge Foley warned LT Game during a hearing on Shuffle Master's Motion to Compel Initial  
26 Disclosures that, in his opinion, this Court would likely grant Shuffle Master's Motion to Dismiss  
27 the First Amended Complaint. As LT Game concedes in its Motion for Leave to File Second  
28 Amended Complaint (the "Motion"), once "the Magistrate Judge intimated that [LT Game's] First

1 Amended Complaint may have been sparse on specific allegations," and would likely be  
2 dismissed, LT Game realized it was finally time to look at its claims and amend its pleading yet  
3 again. (See Mot., 8:9-10.) However, the time for LT Game to investigate its claims was *before*  
4 filing them in federal court, not after. LT Game cannot rely upon Rule 15 as an excuse for its lack  
5 of diligence in filing this lawsuit. The Court can and should deny the Motion for that reason  
6 alone.

7 But there is more. LT Game has admitted its own bad faith and dilatory motive in  
8 refusing to investigate its claims before filing the Complaint. The Court may rightly consider this  
9 fact in its review of Plaintiff's Motion. Likewise, the Court may also consider the fact that  
10 LT Game has failed to cure the deficiencies Shuffle Master has repeatedly pointed out in  
11 LT Game's prior pleadings. And, the Court must certainly give significant weight to the  
12 substantial prejudice LT Game's proposed amendment would have on Shuffle Master. Shuffle  
13 Master has been demanding more information from LT Game for months to no avail, only to have  
14 LT Game claim to "discover additional facts" that seek to change the entire nature and scope of  
15 this case. It's far too late for that.

16 If the Court had any lingering doubt as to whether it should deny the Motion, all such  
17 doubt should be cast aside when recognizing the futility in allowing LT Game to file its proposed  
18 Second Amended Complaint. To begin with, LT Game still has not pled its intentional  
19 misrepresentation claims with sufficient particularity, as required under *Vess v. Ciba-Geigy*  
20 *Corp. USA*, 317 F.3d 1097 (9th Cir. 2003). Even with the proposed Second Amended Complaint,  
21 LT Game has failed to tell Shuffle Master what it allegedly said and why it was false and  
22 misleading. As a result, even LT Game's proposed Second Amended Complaint is subject to  
23 dismissal under Rule 9(b) and Rule 8.

24 Equally important, neither LT Game nor the proposed new plaintiff, LT Game (Canada)  
25 Ltd. ("LT Game (Canada)") (together, with LT Game, the "Proposed Plaintiffs"), has standing to  
26 maintain this action against Shuffle Master. Not only did neither Proposed Plaintiff operate as of  
27 July 10, 2012 (when LT Game filed this lawsuit), but by their own concessions, they still do not  
28 conduct business in the State of Nevada or even have gaming licenses to conduct business in this

1 state. Even if they are currently applying for a gaming license, they may never get one. As a  
2 result, the Proposed Plaintiffs are unable to establish a non-speculative injury in fact, as required  
3 for Article III standing.

4 Regardless, even if these parties had standing (which they do not), LT Game alone knew  
5 about the existence of any claims on behalf of LT Game (Canada) from the inception of this  
6 lawsuit. LT Game cites to no "newly discovered" facts, nor could it, relating to this new proposed  
7 plaintiff that justifies the delay in bringing these claims on behalf of LT Game (Canada), to  
8 Shuffle Master's prejudice. LT Game had an obligation to make the new proposed plaintiff a  
9 party from the start if it truly believed LT Game (Canada) had suffered damages based on the  
10 allegations in the complaint. Instead, LT Game did no such thing and delayed seeking to add  
11 LT Game (Canada) as a plaintiff until it was facing the dismissal of its First Amended Complaint.  
12 The addition of LT Game (Canada) at this stage is improper.

13 In the end, the Court has numerous grounds upon which it can deny LT Game's Motion  
14 and the Court should exercise its discretion to do so. A denial of LT Game's Motion is necessary  
15 to stop LT Game from once again moving the target and changing its story to the detriment and  
16 prejudice of Shuffle Master. For any and all of these reasons, Shuffle Master respectfully requests  
17 that the Court deny the Motion.

## 18 **II. RELEVANT BACKGROUND**

### 19 **A. LT Game's Failure To Investigate Its Claims Against Shuffle Master.**

20 LT Game's memory is selective, if not strategic. LT Game filed this action against Shuffle  
21 Master on July 10, 2012, alleging claims for unfair competition under Macau, federal and state  
22 laws, as well as for purported intentional interference with prospective and current contractual  
23 relations. (*See generally* Dkt. #1, Compl.) In support of its four claims, LT Game alleged only  
24 bare elements of its claims, asserting that Shuffle Master made "misrepresentations" about  
25 LT Game and its products with the "intent to interfere and damage [its] business deals with  
26 current and prospective customers." (Dkt. #1, Compl. ¶¶ 12-13.) Of course, a party is required to  
27 do more than just recite legal elements in a complaint and so, on July 31, 2012, Shuffle Master  
28

1 moved the Court to dismiss LT Game's Complaint pursuant to Rule 12(b)(6), among other  
2 reasons. (*See* Dkt #11, Mot. to Dismiss Compl.)

3 Realizing that its bare-bones Complaint would soon be dismissed, LT Game filed a First  
4 Amended Complaint without leave as permitted under Federal Rule of Civil Procedure  
5 15(a)(1)(B). The First Amended Complaint fared no better than the original. All LT Game did  
6 was add an allegation that some unknown employee or representative of Shuffle Master made  
7 some unidentified statements regarding LT Game's product to unknown employees of LT Game's  
8 purported yet unknown potential customers. (*See* Dkt. #14, Compl. ¶¶ 13-15.) LT Game  
9 remained silent, however, as to the critical issues of who at Shuffle Master allegedly made the  
10 misrepresentations, where, when, and to whom the alleged misrepresentations were made, or even  
11 most importantly what the alleged misrepresentations were. (*See generally id.*) As a result,  
12 Shuffle Master had to file yet another dispositive motion pointing out LT Game's failure to  
13 adequately plead its claims in this case in an effort to avoid having to litigate and defend itself in  
14 the dark. (*See generally* Dkt. #17, Mot. to Dismiss First Am. Compl.)

15 Although the Court has not ruled on Shuffle Master's second motion to dismiss,<sup>1</sup> Shuffle  
16 Master has endeavored to still meet its discovery obligations in this case. The parties conducted a  
17 Rule 26(f) conference on September 25, 2012. During the conference, counsel for Shuffle Master  
18 asked about "the subjects on which discovery may be needed," as required under the Rule. But  
19 counsel for LT Game was unable or unwilling to give an answer with any particularity. Instead,  
20 he asserted that LT Game was entitled to conduct discovery on all topics and issues raised by the  
21 allegations contained in the First Amended Complaint, as follows:

22 This case involves unfair competition and tortious interference with business and  
23 contractual claims related to Defendant's unlawful actions in international  
24 commerce and international trade shows, including, but not limited to, to  
25 Defendant's unlawful actions in Macau and Australia.

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26  
27 <sup>1</sup> For a complete analysis of why LT Game was required to plead its intentional misrepresentation  
28 claims with particularity under Rule 9(b), Shuffle Master directs the Court to the pending Motion to  
Dismiss the First Amended Complaint, Dkt. #17.

1 (Dkt. #20, LT Game's Prop. Disc. Plan and Sched. Order, 2:12-18.) LT Game's position provided  
2 Shuffle Master little guidance in the nature of its allegations.

3 The same was true with respect to LT Game's initial disclosures. After asking for and  
4 receiving two extra weeks to make ensure its initial disclosures would be "complete," on October  
5 19, 2012, LT Game disclosed to Shuffle Master the equivalent of nothing. Thumbing its nose at  
6 its obligations under Rule 26(a), LT Game failed to produce or identify a single document, failed  
7 to specify the subjects of information or knowledge of its potential witnesses, and failed to give  
8 any explanation or computation of its alleged damages. In LT Game's view, it had no obligation  
9 disclose anything because the case was still in the "beginning stage of litigation and discovery"  
10 and thus it only had to make initial disclosures based on "information available to it at the time."  
11 (See Dkt. #25, LT Game's Opp'n to Mot. to Compel Initial Discl., 5:18, 7:1.) Thus, as of  
12 October 19 (three months after filing this lawsuit), LT Game still had no documents or witnesses  
13 to support its claims, and no way to compute damages resulting from Shuffle Master's alleged  
14 misrepresentations.

15 Notably, during a meet and confer pertaining to LT Game's initial disclosures, LT Game's  
16 counsel represented that it could not provide more information, either in pleading or disclosures,  
17 because even LT Game did not know anything more about the allegations his client had asserted.  
18 (See Dkt. #24, Mot. to Compel, Ex. A, Miltenberger Decl. ¶ 13.) LT Game simply believed that  
19 someone related to Shuffle Master said something about LT Game's products which undermined  
20 its ability to conduct business. (See *id.* ¶ 13.) LT Game's counsel conceded that if this Court  
21 granted Shuffle Master's Motion to Dismiss the First Amended Complaint for failing to plead in  
22 conformity with Rules 8 and 9(b), LT Game would then have to go back and investigate the basis  
23 for its claims. (*Id.*) Not wanting to leave anything to chance, Shuffle Master filed a Motion to  
24 Compel Initial Disclosures on November 7, 2012. (See generally Dkt. # 24, Mot. to Compel.)

25 In the meantime, Shuffle Master also propounded interrogatories, requests for admission,  
26 and requests for production of documents upon LT Game. Shuffle Master hoped that in having to  
27 respond to written discovery, LT Game may finally explain the basis for this lawsuit. LT Game's  
28 answer (or lack thereof) came on November 30, 2012. It objected to Shuffle Master's discovery

1 because "*discovery is still in the early stages and Plaintiff's investigations regarding Plaintiff's*  
2 *claims are ongoing*," and simply directed Shuffle Master back to the vague allegations contained  
3 in its First Amended Complaint. (See, e.g., Ex. 1, LT Game's Suppl. Answers to Shuffle Master's  
4 First Set of Interrog. Nos. 3-9 (emphasis added).

5 On January 24, 2013, Magistrate Foley heard Shuffle Master's Motion to Compel Initial  
6 Disclosures. Magistrate Foley immediately recognized that the problems with LT Game's initial  
7 disclosures stemmed from the problems with its pleadings. (See Dkt. #34, Order, 3 n. 1 (the  
8 Magistrate Judge noted that "Defendant previously filed a motion to dismiss Plaintiff's original  
9 complaint which was even less specific in its allegations.")) That is to say:

10 [Shuffle Master's] motion to compel Plaintiff to provide more detailed Rule 26(a)  
11 disclosures arises, in part, from its argument that because the allegations of the  
12 First Amended Complaint are so vague, Plaintiff's equally vague disclosures of  
witnesses, documents and alleged damages leaves Defendant with little concrete  
information about the nature or substance of Plaintiff's allegations.

13 (*Id.* at 5:12-15.) The Magistrate Judge explained to LT Game that its pleading was so vague, he  
14 expected this Court to grant Shuffle Master's Motion to Dismiss the First Amended Complaint.  
15 (See Ex. 2, Hrg. Tr. dated Jan. 24, 2013, 17:3-7 (The Court: "I've looked at the original complaint  
16 and the amended complaint, and what I see there is you say: We've been disparaged by the  
17 defendants. You don't say what was said, you don't say where it was said, when it was said, and  
18 by whom it was said. Now, that's on the motion to dismiss."))

19 In response, LT Game admitted it did not know much about anything it alleged in the  
20 Complaint and First Amended Complaint, but claimed that it could find those things out during  
21 discovery. As he put it to the Magistrate Judge:

22 Now, what exactly was said to who? That's the subject of discovery, your Honor.  
23 That's not a requirement of pleading, we submit. It's – sometimes it's there, but  
24 we don't have – we don't have a little more detail, and that's why we need  
discovery."

25 (*See id.*, 20:8-12.) LT Game went on to explain:

26 Yes, we do need more information about who said what when. We need to get into  
27 their e-mails we need to get into witnesses; both their witnesses and third party  
28 witnesses, your Honor.



1 (*Id.*, 31:4-7.) In one fell swoop, LT Game acknowledged that it had filed this lawsuit as a fishing  
2 expedition as Shuffle Master has contended all along. Ultimately, "the Court agree[d] that  
3 combined with the lack of specific factual allegations in the complaint, Plaintiff's initial  
4 disclosures lack[ed] sufficient information" and granted Shuffle Master's Motion to Compel.  
5 (Dkt. #34, Order, 5:20-22.)

6 **2. LT Game's Second Amended Complaint**

7 It is safe to say that once "the Magistrate Judge intimated that [LT Game's] First Amended  
8 Complaint may have been sparse on specific allegations," and thus would likely be dismissed by  
9 this Court, LT Game realized it needed to finally investigate its claims, although it was obligated  
10 to do long ago. (*See* Mot., 8:9-10.) Indeed, on the eve of the deadline for amending pleadings,  
11 LT Game sought leave to file the proposed Second Amended Complaint and subsequently filed  
12 this Motion. In its proposed pleading, LT Game names (for the first time) two Shuffle Master  
13 employees that LT Game alleges made misrepresentations regarding LT Game's products to  
14 current and prospective customers, alleges (for the first time) additional prospective and current  
15 customers the alleged misrepresentations were made to, and alleges (for the first time) some  
16 additional locations where the alleged misrepresentations took place. (*See* Prop. Sec. Am.  
17 Compl. ¶¶ 20-24.) It also inexplicably seeks to add (for the first time) one of its sister companies,  
18 LT Game (Canada), as a plaintiff.

19 But LT Game was not done there: it took the opportunity to lodge entirely new (and even  
20 more outrageous) allegations against Shuffle Master. First, LT Game alleges that Shuffle Master  
21 threatened LT Game with litigation back in 2009 and 2010 over patent infringement. (*See*  
22 *id.* ¶ 22.) And second, and more egregiously, LT Game alleges (in both its Motion and proposed  
23 Second Complaint) that Shuffle Master "has already been found guilty of deliberate patent rights  
24 violations by the criminal courts in Macau." (Mot., 8:20-22.) To be sure, both of LT Game's new  
25 allegations are utterly false and nothing short of misrepresentations to the Court. Shuffle Master  
26  
27  
28

1 has not committed any crimes nor been found guilty of anything by any court. Such a  
2 misrepresentation is appalling and inexcusable.<sup>2</sup>

3 LT Game claims in its Motion that it "discovered [these] additional facts . . . since filing  
4 the First Amended Complaint." (See Mot., 8:11-13.) However, the truth is that LT Game did not  
5 look for the "facts" until January 24, 2013, when the Magistrate Judge warned LT Game that its  
6 First Amended Complaint would likely be dismissed. (See Ex. 2, Hrg. Tr. dated Jan. 24, 2013,  
7 19:19-23.) Indeed, that is exactly what counsel for LT Game originally told counsel for Shuffle  
8 Master would happen – "if the Court grants your motion to dismiss, I guess we'll have to go back  
9 and better investigate our claims." (See Dkt. #24, Mot. to Compel, Ex. A, Miltenberger  
10 Decl. ¶ 13.) It is almost as if LT Game knew its pleading would be dismissed, and would  
11 eventually have to go back and figure out why it was suing Shuffle Master in the first place,  
12 something Rule 11 required *before* filing the lawsuit, not six months later.

13 In any case, during its recent investigation LT Game must have realized that there was no  
14 evidence to support its prior allegations and that it would have to come up with new allegations  
15 and change the entire scope and nature of the case to justify why it should not be dismissed.  
16 LT Game hopes that if it keeps fabricating smoke, the Court might actually believe there is a fire.  
17 There is neither. And LT Game must be held accountable not only for its lack of candor to this  
18 Court, but also its failure to investigate its claims before lodging them against Shuffle Master in  
19 this case.

### 20 III. DISCUSSION

#### 21 A. Shuffle Master Has Never Been Found Guilty Of Patent Infringement.

22 Before addressing the many reasons why the Court should deny LT Game's Motion, it is  
23 important to address LT Game's offensive and reckless assertion that Shuffle Master "has already  
24

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25 <sup>2</sup> LT Game's baseless complaint for patent infringement is still pending in Macau and part of a  
26 separate litigation between different parties and based on different set of facts. That action is irrelevant to  
27 this action. Shuffle Master and its subsidiary, Shuffle Master Asia Limited, which is now known as  
28 SHFL entertainment (Asia) Limited ("SMA"), look forward to the day when Chun and his companies  
(including LT Game) can no longer make outrageous and despicable claims that Shuffle Master or its  
subsidiaries are infringing upon Chun's patents.



1 been found guilty of deliberate patent rights violations by the criminal courts in Macau."  
 2 (*Id.*, 8:20-22.) To be perfectly clear, neither Shuffle Master nor any its subsidiaries has ever been  
 3 found guilty of deliberate patent rights violations by the criminal courts in Macau. In fact, in that  
 4 unrelated series of litigation between different parties, the Macau courts have previously found  
 5 that there was insufficient evidence to support Chun's claims of patent infringement. The  
 6 document attached to LT Game's Motion and proposed Second Amended Complaint does not  
 7 change that fact. The document is nothing more than a statement of the accusations asserted  
 8 against SMA. (*See* Ex. 1 to Prop. Sec. Am. Compl., ("The defendant is *accused of*: . . .")  
 9 (emphasis added).) It is in no way a finding or decision of guilt. Notably, the translation is not  
 10 even accurate. LT Game must have believed that Shuffle Master and the Court would simply take  
 11 its translation and explanation of the document without verification. LT Game was wrong in that  
 12 regard. And it was even further mistaken to believe that it could misstate the nature of that  
 13 irrelevant document to provide support for its misguided and defective pleading. Simply,  
 14 LT Game's misrepresentation to the Court is offensive and violates Rule 11 as well as an  
 15 attorney's duty of candor to the Court.

16 **B. The Court Should Deny LT Game's Motion And Proposed Amendment.**

17 Federal Rule of Civil Procedure 15(a) provides that "[a]fter a party has amended a  
 18 pleading once as a matter of course, it may only amend further after obtaining leave of the court."  
 19 The Rule prescribes a liberal policy for granting leave to amend, however, "*[a] liberal policy does*  
 20 *not mean the absence of all restraint. Were that the intention, leave of court would not be*  
 21 *required.*" *Schick v. Finch*, 8 F.R.D. 639, 640 (S.D.N.Y. 1944) (emphasis added); *see also*  
 22 *Jackson v. Bank of Hawaii*, 902 F.2d 1385 (9th Cir. 1990) ("Although the rule should be  
 23 interpreted with 'extreme liberality,' *leave to amend is not to be granted automatically.*"  
 24 (emphasis added)). As a result, the right to amend is "tempered" with considerations such as  
 25 (1) undue delay; (2) bad faith or dilatory motives on the part of the movant; (3) repeated failure to  
 26 cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; or  
 27 (5) futility of the proposed amendment. *Grand Canal Shops II, LLC v. Iavarone*,  
 28 2:12-CV-00213-KJD, 2012 WL 6041643 (D. Nev. Dec. 4, 2012); *Foman v. Davis*, 371 U.S. 178,

1 182 (1962). Ultimately, "the allowance or refusal to permit amendment lies in the discretion of  
 2 the district court." *Komie v. Buehler Corp.*, 449 F.2d 644, 647 (9th Cir. 1971). It is within this  
 3 legal framework that the Court can and should deny LT Game's Motion.

4 ***1. The Proposed Second Amended Complaint is the Result of Undue Delay.***

5 As a starting point, the Court should deny LT Game's proposed amendment simply based  
 6 on its untimeliness. *See Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365-66 (10th Cir. 1993) ("It is  
 7 well settled that untimeliness alone is a sufficient reason to deny leave to amend especially when  
 8 the party filing the motion has no adequate explanation for the delay."). LT Game filed this action  
 9 on July 10, 2012, with nothing more than "unadorned, the-defendant-unlawfully-harmed-me  
 10 accusation[s]" that are completely insufficient under any standard of pleading. *See Ashcroft v.*  
 11 *Iqbal*, 556 U.S. 662, 677 (2009) ("Threadbare recitals of the elements of a cause of action,  
 12 supported by mere conclusory statements, do not suffice."). LT Game's First Amended Complaint  
 13 was no better. According to LT Game, it had no obligation to investigate its claims or provide  
 14 Shuffle Master for their basis. (See Dkt. #24, Mot. to Compel, Ex. A, Miltenberger Decl. ¶ 13;  
 15 Ex. 1, LT Game's Suppl. Answers to Shuffle Master's First Set of Interr. Nos. 3-9 (LT Game  
 16 refusing to explain the basis for its claims because "discovery is still in the early stages and  
 17 Plaintiff's investigations regarding Plaintiff's claims are ongoing").) This is just one more instance  
 18 where LT Game is wrong on the law.

19 Of course, a party is required to fully investigate its claims *before* filing them in federal  
 20 court. *See Ellis v. Beemiller, Inc.*, 287 F.R.D. 326, \*2 (W.D. Pa. Nov. 19, 2012) ("Rule 11  
 21 imposes upon attorneys an affirmative duty to conduct a reasonable investigation into the facts of  
 22 a claim both prior to filing suit and thereafter in order to ensure that the assertions contained in  
 23 each paper submission are made with reasonable belief that they are well-grounded in fact.")  
 24 Thus, in assessing the timeliness of a request to amend, a court must "not merely ask whether a  
 25 motion was filed within the period of time allotted by the district court in a Rule 16 scheduling  
 26 order. Rather, in evaluating undue delay, [the court must] also inquire whether the moving party  
 27 knew or should have known the facts and theories raised by the amendment in the original  
 28 pleading." *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir. 2006)

1 *"Where the party seeking amendment knows or should know of the facts upon which the*  
 2 *proposed amendment is based but fails to include them in the original complaint, the motion to*  
 3 *amend may be denied."* *E.E.O.C. v. Boeing Co.*, 843 F.2d 1213, 1222 (9th Cir. 1988); *Jackson v.*  
 4 *Bank of Hawaii*, 902 F.2d 1388 (9th Cir. 1990) ("Relevant to evaluating the delay issue is whether  
 5 the moving party knew or should have known the facts and theories raised by the amendment in  
 6 the original pleading."); *see also Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*,  
 7 690 F.2d 1157, 1163 (5th Cir. 1982) ("When there has been an apparent lack of diligence, the  
 8 burden shifts to the movant to prove that the delay was due to excusable neglect.").

9 Based on the history of this case and LT Game's prior statements to Shuffle Master and  
 10 this Court, there is no question that it failed to investigate its claims prior to asserting them in this  
 11 case. The question becomes, then, whether LT Game "knew or should have known" these "newly  
 12 discovered facts" prior to January 31, 2013, when it moved the Court for leave to file the proposed  
 13 Second Amended Complaint. The answer is a resounding "yes." LT Game should have known  
 14 the "who, what, where, when, and how" behind its claims for intentional misrepresentation before  
 15 filing them. *See Ryan v. Rexworks, Inc.*, CIV 06-5866 (NLH), 2008 WL 4066363, \*3 (D.N.J.  
 16 Aug. 26, 2008) ("[P]laintiffs have an obligation to diligently investigate and determine the identity  
 17 of potentially liable parties prior to the filing of the initial complaint."). In fact, these are things  
 18 that LT Game should have included in its original Complaint back on July 31, 2012. *See Vess v.*  
 19 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-06 (9th Cir. 2003) (requiring a party to plead  
 20 claims that "sound in fraud" with particularity). LT Game has no excuse for either failure.

21 Moreover, LT Game has unquestionably known about the majority of the "newly  
 22 discovered facts" for almost four years. That is, LT Game alleges that in May of 2009 and  
 23 April of 2011, an employee of Shuffle Master, "among other threats, threatened Plaintiffs with  
 24 litigation, if they did not transfer their intellectual property rights into a patent pool for Defendant  
 25 to use at no cost." (Prop. Sec. Am. Compl. ¶ 13.) If an employee of Shuffle Master threatened  
 26 LT Game back in May of 2009 and April of 2011 (which certainly did not happen), LT Game  
 27 would have known about such conduct when it filed its Complaint in July 2012. For some reason,  
 28 however, that manufactured allegation never made it into a pleading, until now.

1 Even if this Court were to take LT Game's ridiculous allegations as true, as admittedly it  
2 must, the fact remains that LT Game either knew or should have known about all of the "newly  
3 discovered facts" before filing its Complaint on July 10, 2012 and its First Amended Complaint  
4 on August 17, 2012 – not to mention when it responded to Shuffle Master's written discovery on  
5 November 30, 2012. Instead, LT Game strategically stuck its head in the ground for months and  
6 represented to Shuffle Master (and this Court) that it had disclosed everything it knew. That was  
7 obviously false and the Federal Rules of Civil Procedure require much more. The Court should  
8 deny LT Game's Motion for the simple fact that it knew or should have known all of the "newly  
9 discovered facts" prior to filing this lawsuit, instead of wasting Shuffle Master and the Court's  
10 time and resources over the last six months in discovery.

11 **2. *LT Game's Bad Faith and Dilatory Motives Warrant Denial of the***  
12 ***Motion.***

13 LT Game's bad faith and dilatory motives also support denial of its Motion and proposed  
14 Second Amended Complaint. Surely LT Game knew that it had to investigate its claims prior to  
15 filing them in a complaint with this Court – but it chose not to do so. This was by design, not  
16 mistake. LT Game believed that if it could plead overly vague allegations, it could justify overly  
17 broad and abusive discovery encompassing Shuffle Master's operations and customers throughout  
18 the world. (Dkt. #20, LT Game's Prop. Disc. Plan and Sched. Order, 3:15-16 ("Subjects on which  
19 discovery may be needed: All issues and allegations as set forth in the First Amended  
20 Complaint."); 2:12-18 ("This case involves unfair competition and tortious interference with  
21 business and contractual claims related to Defendant's unlawful actions in international commerce  
22 and international trade shows, including, but not limited to, to Defendant's unlawful actions in  
23 Macau and Australia."); Ex. 2, Hrg. Tr. dated Jan. 24, 2013, 31:4-7 ("Yes, we do need more  
24 information about who said what when. We need to get into their e-mails we need to get into  
25 witnesses; both their witnesses and third party witnesses, your Honor.))) Indeed, LT Game  
26 strategically chose not to investigate its claims because it did not want to limit the scope of its  
27 discovery (harassment) in this case.  
28

1 Also important is the timing of LT Game's "discovery" of these "new facts." LT Game did  
2 not discover them while trying in good faith to respond to Shuffle Master's written discovery. No,  
3 LT Game admittedly only removed the blinders after "the Magistrate Judge intimated that  
4 [LT Game's] First Amended Complaint may have been sparse on specific allegations," and thus  
5 would likely be dismissed by this Court. (See Mot., 8:9-10.) And this is exactly what counsel for  
6 LT Game told Shuffle Master would happen. He admitted that if and when this Court granted  
7 Shuffle Master's Motion to Dismiss, he and his client would have to go back and look for more  
8 information about its claims after the fact. (See Dkt. #24, Mot. to Compel, Ex. A, Miltenberger  
9 Decl. ¶ 13.) By its own words, LT Game was only going to comply with its pleading and  
10 discovery requirements *if* this Court threatened to dismiss this action, which is the epitome of bad  
11 faith. LT Game has no excuse otherwise.

12 **3. *LT Game's Amendments Would Severely Prejudice Shuffle Master.***

13 It goes without saying that "[p]rejudice to the opposing party is the most important factor."  
14 *Jackson*, 902 F.2d at 1387. And, given the above, it should also go without saying that granting  
15 LT Game's Motion would severely prejudice Shuffle Master in this case.

16 Incredibly, LT Game claims that granting the Motion would cause no prejudice to  
17 Shuffle Master because "the parties are in the infancy of discovery in this case." (Mot., 7:11-12.)  
18 Not so. Although LT Game may be in the infancy of its discovery, Shuffle Master has already  
19 propounded and received responses to written discovery from LT Game and spend valuable time  
20 and resources attempting to evaluate the amorphous basis of LT Game's allegations.  
21 Shuffle Master has been forced to accept LT Game's claim that it has no additional information,  
22 and has developed a strategy for defending this case based on that claim. LT Game should not be  
23 allowed to change its mind and tell Shuffle Master it now wants to disclose allegations it should  
24 have known long ago and change the entire scope of this litigation. By the same token, Shuffle  
25 Master should not have to effectively reissue discovery propounded in this case simply because  
26 LT Game now claims to have "discovered additional facts" related to its claims in this case and  
27 finally decided what it wants to serve as the basis for its lawsuit. LT Game had its chance to  
28 provide support for its claims. It chose not to do so, and it should be bound by that decision.

Moreover, LT Game's assertion ignores the procedural history of this case. Shuffle Master has been conducting meet and confers and filing motions to get LT Game to comply with its pleading and discovery obligations in this case. All of that time and money would be wasted if LT Game were allowed to come in now and file what is the equivalent of a new lawsuit. Indeed, Shuffle Master now has a new plaintiff asserting new claims against it. Shuffle Master will have to conduct all new discovery related to LT Game (Canada) and its claims, as well as reissue written discovery to LT Game to account for the "newly discovered facts" and changed scope of the lawsuit. LT Game certainly knew of the existence of this new entity and any purported basis to assert claims on its behalf from the inception of the lawsuit, but apparently chose not to allege them for some unknown strategic purpose which does nothing but prejudice Shuffle Master and the discovery it has already completed. On the other hand, the proposed changes will have little to no effect on LT Game because it has only produced a handful of documents and can simply "supplement" its prior responses to Shuffle Master's discovery.

Despite what LT Game tells this Court in its Motion, Shuffle Master had no notice of this new party and its new claims. Shuffle Master was never given notice of LT Game's claims, let alone those of another foreign entity called LT Game (Canada). To that end, LT Game did not even identify LT Game (Canada) as an interested party pursuant to Rule 7.1, and yet it tells this Court that Shuffle Master knew all along that LT Game (Canada) may come into this case. (*See* Dkt. #10, Notice of Interested Parties (LT Game certifying "that there are no known interested parties other than those named in the caption").) Nonsense. This is just another example of LT Game not doing its due diligence (or even knowing the existence of an affiliated, potential plaintiff) before filing this lawsuit.

LT Game's insufficient pleading and failure to participate in discovery have already prejudiced Shuffle Master's ability to defend itself in this action. Granting it leave to file yet another deficient pleading would only compound the prejudice. Remember, it was LT Game that chose not to investigate its claims (as it was required to do) prior to filing this nonsensical lawsuit. Shuffle Master should not have to bear the burden for LT Game's negligence.



1                   4.     ***LT Game has Repeatedly Failed to Cure Deficiencies in its Pleadings.***

2             Again, LT Game has already had two opportunities to make a proper pleading, and has  
3 failed on both accounts. The proposed Second Amended Complaint is no different. As  
4 Shuffle Master first pointed out on July 31, 2012, and then again on September 4, 2012, LT Game  
5 must plead "the who, what, when, where, and how" behind its claims of intentional  
6 misrepresentation. *Vess*, 317 F.3d at 1106 (citations omitted). Moreover, it "must set forth what  
7 is false or misleading about a statement, and why it is false." *Decker v. GlenFed, Inc.*, 42 F.3d  
8 1541, 1548 (9th Cir. 1994). A claim for misrepresentation must be "specific enough to give  
9 defendants notice of the particular misconduct which is alleged to constitute the fraud charged so  
10 that they can defend against the charge and not just deny that they have done anything wrong."  
11 *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

12             LT Game still has not met these threshold pleading requirements with its third attempt.  
13 Although the proposed Second Amended Complaint offers a few more details about the  
14 circumstances behind Shuffle Master's alleged misrepresentations, LT Game has not set forth  
15 what Shuffle Master allegedly said to its current and prospective customers, and explained why  
16 Shuffle Master's statements were false or misleading. Moreover, LT Game must also establish  
17 that Shuffle Master's alleged misrepresentations are even actionable. As the Fifth Circuit  
18 explained in *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489 (5th Cir. 2000):

19             Essential to any claim under section 43(a) of the Lanham Act is a determination of  
20 whether the challenged statement is one of fact – actionable under section 43(a) – or  
21 one of general opinion – not actionable under section 43(a). Bald assertions of  
22 superiority or general statements of opinion cannot form the basis of Lanham Act  
23 liability. Rather the statements at issue must be a specific and measurable claim,  
24 capable of being proved false or of being reasonably interpreted as a statement of  
25 objective fact. ... A statement of fact is one that (1) admits of being adjudged true  
26 or false in a way that (2) admits of empirical verification.

27             *Id.* at 495–96 (internal citations and quotations omitted); *see also Southland Sod Farms v. Stover*  
28 *Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997) (stating that in order to constitute a statement of  
fact, a statement must make "a specific and measurable advertisement claim of product  
superiority").

1 Indeed, "[o]ne form of non-actionable statements of general opinion under section 43(a) of  
 2 the Lanham Act has been referred to as 'puffery.'" *Id.* at 496. The Third Circuit has described  
 3 "puffing" as "advertising that is not deceptive for no one would rely on its exaggerated claims."  
 4 *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3d Cir.1990).  
 5 Similarly, the Ninth Circuit has defined "puffing" as "exaggerated advertising, blustering and  
 6 boasting upon which no reasonable buyer would rely and is not actionable under 43(a)."  
 7 *Southland Sod Farms*, 108 F.3d at 1145 (quoting 3 J. Thomas McCarthy, McCarthy on  
 8 Trademarks and Unfair Competition § 27.04(4)(d) (3d ed. 1994). Non-actionable "puffery" also  
 9 includes "product superiority claims that are vague or highly subjective." *Id.*

10 In this case, and even with the proposed Second Amended Complaint, LT Game has not  
 11 come close to pleading sufficient facts to make a *prima facie* showing that its claims against  
 12 Shuffle Master are actionable. Although LT Game claims that Shuffle Master made some  
 13 undescribed misrepresentations "regarding Plaintiffs, their commercial activities, intellectual  
 14 property, and/or their products and services," (Prop. Sec. Am. Compl. ¶ 20), the lone allegation  
 15 does not allow Shuffle Master or the Court to determine whether the alleged statements are  
 16 actionable statements of fact, or non-actionable statements of general opinion – *i.e.*, puffery.  
 17 Again, this was all explained to LT Game as early as July 31, 2012, and yet LT Game refuses to  
 18 fix the deficiencies in its pleadings. The Court should deny LT Game's Motion, thereby saving  
 19 Shuffle Master from having to file a third motion to dismiss.

#### 20 **5. LT Game's Amendment is Futile and Must be Denied.**

21 Similarly, the most important reason why the Court should deny the Motion is because of  
 22 its downright futility. That is, even if the Court were to grant LT Game's Motion and allow the  
 23 proposed Second Amended Complaint to become the operative complaint, LT Game has still  
 24 failed to state a claim upon which relief may be granted. *See Miller v. Rykoff-Sexton, Inc.*,  
 25 845 F.2d 209, 214 (9th Cir. 1988) ("The test for futility is identical to the one used when  
 26 considering the sufficiency of a pleading challenged under Rule 12(b)(6)."). Indeed, "where the  
 27 proposed amendment is insufficient in law and would thus be a useless act, it is proper, at least in  
 28 this Circuit, to deny leave to amend." *Gilbertson v. City of Fairbanks*, 262 F.2d 734, 740 (9th Cir.

1 1959); *see also Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546 (5th Cir. 1980)  
 2 ("Leave to amend need not be given if a complaint, as amended, is subject to dismissal").  
 3 "Futility alone can justify the denial of a motion to amend." *Johnson v. Buckley*, 356 F.3d 1067,  
 4 1077 (9th Cir. 2004).

5 In addition to the pleading deficiencies identified above, granting the Motion is futile  
 6 because neither LT Game nor the proposed, new plaintiff LT Game (Canada) have standing to  
 7 maintain this action. Neither was registered to do business the United States or Nevada until late  
 8 last year, after LT Game filed this action here in Nevada. (Ex. 3, LT Game's Suppl. Answers to  
 9 Shuffle Master's Req. for Adm. Nos. 10-11; Mot., 4 n. 2.) And neither is currently licensed to sell  
 10 or distribute gaming devices or associated equipment in the State of Nevada, or obtained the  
 11 necessary approvals to do so. (*Id.*, Nos. 12-14 (Plaintiff admitting it is not licensed to sell or  
 12 distribute gaming devices or associated equipment in the State of Nevada, "but is in the  
 13 application process."))<sup>3</sup> Thus, not only are the Proposed Plaintiffs unable to demonstrate  
 14 damages in this case (as none have occurred to date as a matter of law), they may never be able to  
 15 prove damages unless and until they become licensed as a gaming distributor by the Nevada  
 16 Gaming Commission. *See* NRS 463.650 ("[I]t is unlawful for any person . . . to operate, carry on,  
 17 conduct or maintain any form of manufacture, selling or distribution of any gaming device . . .  
 18 without first procuring and maintaining all required federal, state, county and municipal  
 19 licenses.").

20 They have suffered no "injury in fact," and therefore have no standing in this case. *See*  
 21 *Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 543 (D. Nev. 2004) ("To establish standing  
 22 under Article III of the United States Constitution, a plaintiff must show: '(1) it has suffered an  
 23 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or  
 24 hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it  
 25 is likely, as opposed to merely speculative, that the injury will be redressed by a favorable  
 26

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27 <sup>3</sup> According to Paradise Entertainment Corporation's 2011 Annual Report, LT Game (Canada) is an  
 28 "inactive" entity. (Ex. 4, SHFL000088 (excerpt from 2011 Annual Report)).

1 decision.") (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167,  
2 180–81 (2000)).

3 The case of *Joint Stock Society v. UDV N. Amer., Inc.*, 266 F.3d 164, 177 (3d Cir. 2001) is  
4 illustrative. In that case, a plaintiff brought suit against the defendant for allegedly making  
5 misrepresentations about the origin of its products. The plaintiff claimed that because of the  
6 defendant's misrepresentations, it was precluded from entering into the United States market and  
7 otherwise competing with the defendant's products. The Third Circuit ultimately found that "the  
8 plaintiff's putative injuries, when characterized in this manner, do not suffice for Article III  
9 standing." *Id.* at 176. The plaintiffs "ha[d] failed to create a genuine issue that they ha[d]  
10 suffered an injury in fact for the simple reason that the plaintiffs have never marketed any vodka  
11 in the United States and have not adduced any evidence establishing that they are prepared at this  
12 time to sell any vodka in this country." *Id.* Thus, "[t]he defendant's allegedly false advertising  
13 cannot have harmed plaintiffs by channeling their customers toward [its products] when plaintiff  
14 have not even begun offering their product for sale in the United States." *Id.*

15 All but conceding the above, LT Game asserts that it still has standing as an "exclusive  
16 licensee" to assert damages on behalf of its parent company, LT Game Ltd. (*See* Ex. 5,  
17 LT Game's Answers to Shuffle Master's Req. for Adm. Nos. 15-23 (LT Game claiming damages  
18 "based on its business relationship with its licensor"); *see also* Ex. 3, LT Game's Suppl. Answers  
19 to Shuffle Master's Req. for Adm. Nos. 21-23 (LT Game seeking damages on behalf of its  
20 "licensor").) Even LT Game's backup plan, however, falls flat. Even if LT Game were the  
21 "exclusive licensee" of LT Game Ltd. in Nevada, as it claims, LT Game Ltd. itself is not licensed  
22 to sell or distribute gaming devices in this state. Thus, even if LT Game were to rely upon "its  
23 business relationship with its licensor" to allege claims on behalf of its licensor LT Game Ltd.,  
24 those claims still fail because neither company has sustained and likely will sustain damages as a  
25 result of the alleged misrepresentations. Any way LT Game spins it this case must be dismissed,  
26 and it futile for LT Game to amend its First Amended Complaint when the end result (dismissal)  
27 is the same.  
28

## 1 IV. CONCLUSION

2 LT Game's Motion should be denied both for what it says, and for what it does not say.  
3 LT Game's proposed Second Amended Complaint contains the same, fatal defects as its prior  
4 pleadings. Most notably, LT Game still cannot explain what Shuffle Master allegedly said, or  
5 allege facts as to why those representations were false and misleading. However, when the Court  
6 looks beyond the glaring defects in the proposed pleading, it becomes clear that this entire  
7 exercise is the result of LT Game's strategic decision not to investigate its claims before filing  
8 them against Shuffle Master. LT Game is using (more accurately, abusing) this Court's patience  
9 as well as the Federal Rules of Civil Procedure to further its own gamesmanship and harassment.  
10 The Court should stop LT Game once and deny the Motion.

11 DATED this 19<sup>th</sup> day of February, 2013.

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